

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BRIAN INGALLS,

Plaintiff-Appellee,

v

TONYA INGALLS,

Defendant-Appellant.

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UNPUBLISHED

July 28, 2000

No. 219773

Muskegon Family Court

LC No. 96-233248 DM

Before: Doctoroff, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from a May 7, 1999 order of the Muskegon Family Court denying her request for a change of physical custody and modifying the parenting time provisions of the parties' divorce judgment. We affirm.

Defendant argues that the trial court deprived her of due process and the right of confrontation when it decided the merits of her custody motion after prematurely ending the evidentiary hearing. Defendant asserts that the premature resolution of the custody matter denied her the opportunity to cross-examine plaintiff as well as the opportunity to present the testimony of a psychologist or the rebuttal testimony of the Friend of the Court investigator.

The character of the errors alleged are such that defendant was obligated to advance a timely objection below to preserve them for appellate review. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). Our review of the record, such that it is, fails to disclose any satisfaction of the preservation requirement. Accordingly, defendant's claimed errors are unpreserved.

Nevertheless, we may review claims of constitutional error for the first time on appeal when the alleged error would have been decisive to the outcome of the lower court proceedings. *In re Hildebrant*, 216 Mich App 384, 389; 548 NW2d 715 (1996). In the instant case, we cannot conclude that any error occurred that would have undermined the validity of the lower court proceedings. Defendant has failed to explain why the December 23, 1998 evidentiary hearing was adjourned to March 2, 1999 or what occurred at the March 2, 1999 conference in the trial court's chambers. In the absence of any record with regard to what occurred between the August 27, 1998

evidentiary hearing and the trial court's rendering of its decision on March 24, 1999, we cannot ascertain whether any action of the trial court deprived defendant of an opportunity to cross-examine plaintiff, or to present the testimony of the psychologist or the Friend of the Court investigator or whether defendant waived her right to present further testimony as a matter of trial strategy. Under these circumstances, defendant's attribution of error to the trial court fails for lack of record support.

Defendant next argues that the trial court's denial of her change of custody request must be reversed because the trial court committed legal error in its evaluation of several of the twelve statutory best interest factors, MCL 722.23; MSA 25.312(3), and made findings against the great weight of the evidence with regard to several of these same factors. We need not reach the merits of these claims. The trial court could amend the custody provisions of the prior divorce judgment only "for proper cause shown or because of a change of circumstances." MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Dehring v Dehring*, 220 Mich App 163, 164-165; 559 NW2d 59 (1996). Our review of the trial court's decision reveals that the trial court made no determination with regard to whether defendant had carried her burden of demonstrating either proper cause or changed circumstances warranting the revisiting of the original custody determination. The trial court was not authorized by MCL 722.27(1)(c); MSA 25.312(7)(1)(c) to revisit an otherwise valid prior custody judgment and engage in reconsideration of the statutory best interest factors without first finding that defendant had shown proper cause or a change of circumstances necessitating the revisiting of the original custody determination. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). In other words, the trial court's reconsideration of the enumerated best interest factors is conditioned upon a determination by the trial court that the party seeking the change has demonstrated proper cause or changed circumstances. *Id.* Accordingly, we conclude that the trial court erred when it resolved defendant's change of custody request based solely on a reconsideration of the best interest factors.

However, we conclude that the trial court reached the correct result, albeit for an incorrect reason. *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997). Because defendant sought to change custody, she bore the burden of establishing either proper cause or a change of circumstances warranting a change in custody. *Rossow*, 206 Mich App 458. Our review of the evidentiary record reveals that defendant's presentation of proofs was focused on establishing that a custodial environment existed with her and that the best interest factors should be weighed in her favor. The record is devoid of any evidence directed at satisfying the statutory prerequisite for a change of custody. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). Defendant's failure to present proofs in an attempt to demonstrate proper cause or changed circumstances required the trial court to deny the change of custody request. Accordingly, we affirm the order denying defendant's request for change of custody, albeit on a ground other than the one relied upon by the trial court. *Phinney*, 222 Mich App 532.

To the extent that defendant challenges that trial court's decision to modify the parenting time provisions in the original divorce judgment, we again observe that the court could only revisit the parenting time provisions contained in the original divorce judgment upon a showing of proper cause or changed circumstances warranting such action. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Terry v Affum (On Remand)*, 237 Mich App 522, 534-535; 603 NW2d 788 (1999). In the instant case, in

conjunction with its decision to modify the parenting time provisions of the divorce judgment, the trial court made the requisite finding of changed circumstances, i.e. the impact the child's attendance at elementary school will have on his need for permanence. Defendant does not challenge the validity of this finding.

Instead, defendant challenges the validity of the trial court's determination of several of the best interest factors. When reviewing a child custody matter, we will affirm the trial court's decision unless the trial court's factual findings are against the great weight of the evidence, its discretionary rulings demonstrate a palpable abuse of discretion, or it has made a clear error with regard to a major issue. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994); *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997).

The divorce judgment awarded defendant parenting time every Monday, beginning at 8:30 p.m., through Thursday, ending at 8:30 p.m., plus alternating holidays. Defendant was also given six weeks of parenting time during the summer in two week increments. After the evidentiary hearing at which the trial court discussed the best interest factors, the trial court noted that, "[a]s Brandon will soon be entering regular elementary school, the present joint physical custody arrangement<sup>1</sup> will continue to become more and more burdensome for everyone and will not satisfy the child's needs for permanence." The court then modified defendant's parenting time to every other weekend, from Friday at 6:00 p.m. until Sunday at 6:00 p.m., and alternating Wednesday evenings from 5:00 p.m. to 8:00 p.m. The parties were to alternate holidays with Brandon, and defendant was to have parenting time for one-half of Brandon's Christmas and Spring breaks, as well as five weeks during the summer, with two of those weeks being without parenting time for plaintiff.

We agree with defendant that the trial court was required to determine whether a change in the original parenting time provisions was in the best interests of the child based on its evaluation and determination of the enumerated best interest factors.<sup>2</sup> MCL 722.27(1)(b), (c); MSA 25.312(7)(1)(b), (c); MCL 722.27a(1); MSA 25.312(7a)(1); *Terry, supra* at 535-537; *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992). We have reviewed the trial court's findings regarding the best interest factors challenged by defendant as they relate to the change in parenting time, and find no clear error. After having reviewed the record, we conclude that the findings are not against the great weight of the evidence. Furthermore, the trial court did not abuse its discretion in determining that, because Brandon would soon be starting elementary school, his need for permanence required that he remain

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<sup>1</sup> Contrary to the trial court's statement, the parties did not have a joint physical custody arrangement. The divorce judgment provided that the parties would have joint legal custody of Brandon, with plaintiff having primary physical custody. However, the trial court stated in its opinion that, due to the liberal visitation granted to defendant, the parenting time ordered in the divorce judgment "is almost equivalent to a joint physical custody arrangement because each parent spends an almost equal amount of time with Brandon."

<sup>2</sup> This Court has stated that, while some of the best interest factors are more relevant to disputes regarding custody rather than those regarding parenting time, most of the factors are equally applicable. *Terry, supra* at 537, n 9.

with his father during the week, with the exception of three hours every Wednesday evening, and that defendant's parenting time occur on the weekends.

We therefore affirm the trial court's order denying defendant's request for a change of physical custody and granting plaintiff's motion to modify the parenting time provisions of the divorce judgment.

Affirmed.

/s/ Martin M. Doctoroff

/s/ David H. Sawyer

/s/ Mark J. Cavanagh